

**1120 THIRD DEGREE MURDER: FIRST OR SECOND DEGREE MURDER
NOT SUBMITTED****1122 THIRD DEGREE MURDER: FIRST OR SECOND DEGREE MURDER
SUBMITTED****[BOTH INSTRUCTIONS WITHDRAWN]****COMMENT**

Wis JI-Criminal 1120 and 1122 were originally published in 1966 and were withdrawn in 1982.

The instructions were withdrawn because of statutory changes found in Chapter 173, Laws of 1977, relating to “felony murder”: causing death “as a natural and probable consequence of the commission of or attempt to commit a felony.” Prior to the change, the offense was covered by § 940.03, Third Degree Murder. Chapter 173, Laws of 1977, repealed § 940.03 but reenacted “felony murder” as subsection (2) of § 940.02, Second Degree Murder. There was no significant change in the definition of the offense, but there was a change in penalty.

Under former § 940.03, the penalty was fifteen years in addition to the penalty for the underlying felony. Under § 940.02(2) the penalty is that for a Class B felony: a maximum of 20 years.

The penalty change creates a potential problem. Under former § 940.03, it was not possible to convict the defendant of both the underlying felony and “felony murder” (State v. Carlson, 5 Wis.2d 595, 93 N.W.2d 354 (1958)). Two convictions were not necessary because of the add-on nature of the former penalty for third degree murder.

It is not clear whether a person can be convicted of both the underlying felony and murder under § 940.02(2). It can be argued that the Carlson rule should still apply, and that the underlying felony is a lesser included offense of murder under § 940.02(2), thus prohibiting conviction for both offenses.

Because of this uncertainty the Committee concluded that charges under § 940.02(2) would be rare and no instructions were prepared to replace Wis JI-Criminal 1120 and 1122.

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In *State v. Gordon*, 111 Wis.2d 133, 330 N.W.2d 564 (1983), the Wisconsin Supreme Court held that a person cannot be convicted of both the underlying felony and “felony murder” under § 940.02(2): “Inasmuch as the legislature did not clearly express its intent to authorize multiple punishment for felony-murder and the underlying felony and inasmuch as it did not specifically exempt felony-murder and kidnapping from the purview of §§ 939.66(1) and 939.71, this defendant’s federal constitutional right to be free from double jeopardy was violated in this case.” 111 Wis.2d 133, 146.

Gordon confirmed the Committee’s conclusion that charges under § 940.02(2) would be rare. Therefore, no instructions were prepared to replace Wis JI-Criminal 1120 and 1122.